IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted]

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS AND COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS and COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Rita Gottesman, Marie Mattiello and Paul J. Peyser pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below.

The district court's decision rendered September 18, 1963 is reported at 221 F. Supp. 488 and is printed herein at App. pp. 17-25 hereof. The order of the District Court was made November 12, 1963 and is printed herein at App. pp. 26-28. The order of the Court of Appeals denying

petition for leave to appeal under 28 U. S. C. 1292(b) is unreported and is printed herein at App. p. 31. The order of the Court of Appeals denying motion for rehearing *en banc* is unreported and is printed herein at App. p. 38.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The order of the District Judge was dated November 12, 1963. Petitioners' petition for leave to appeal to the Court of Appeals was filed within ten days on November 21, 1962. The order of the Court of Appeals denying petition for leave to appeal was made January 31, 1964 without opinion. On February 14, 1964 petitioners timely moved for rehearing *en banc*. On March 2, 1964 the Court of Appeals made the following decision (App. p. 37):

"Before Swan, Smith and Marshall, Circuit Judges.

Petition for Rehearing in Banc

Netter, Netter, Dowd & Fox, New York, N. Y. for petitioners.

"Judges Lumbard, Waterman, Moore, Friendly, Kaufman and Hays having elected to disqualify themselves from consideration of this matter, and the remaining qualified judges, Judges Swan, Smith and Marshall, having voted to deny the petition for rehearing en banc, the petition is denied.

T. W. S.
J. J. S.
T. M.
C. J. J."

3/2/64

This petition is filed within ninety (90) days of such decision and order thereon. *Forman* v. *United States*, 361 U. S. 416.

Questions Presented.

The two wholly novel and unprecedented questions presented by this petition may be stated as one:

Whether the Court of Appeals abused its discretion in denying immediate appeal under Title 28, Section 1292(b) where the District Judge had held in a pre-trial decision (App. 24) and order* (App. 26) with respect to the Clayton Act:

> "There can be no claim for money damages for violation of Section 7."

and he had further held that the final judgment dated March 1, 1962 in a suit by the United States against respondents herein, among others, entered pursuant to two decisions by this Court reported 353 U. S. 321 and 366 U. S. 316, could not be used with prima facie effect but merely for "historical purposes and as background material," and where the District Judge had certified in his order in accordance with Section 1292(b):

> "that the foregoing provisions of this order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation."

Necessarily included in the above question is whether the District Judge's unprecedented holding* that Section 7 of the Clayton Act does not afford money damages to an injured party, and his further holding that the judgment

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* The order included "4. Plaintiffs' claims under Section 7 of the Clayton Act do not constitute a basis for either injunctive relief or recovery of money damages in this action, and such claims are hereby *dismissed* as a matter of law." (App. 27) (Emphasis supplied)

thereunder cannot be used with prima facie effect under Section 5(a), required the Court of Appeals to exercise its discretion under 28 U. S. C. 1292(b) to hear and determine an immediate appeal, the standards of which section have never been passed upon or interpreted by this Court.

Statutes Involved

Section 1292(b) of Title 28, U. S. Code, provides as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." As amended Oct. 31, 1951, C. 655, §49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

Section 4 of the Clayton Act (Section 15 of Title 15 U. S. Code) provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 5(a) of the Clayton Act (Section 16(a) of Title 15 U. S. Code) provides as follows:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceedings brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15a of this title."

Section 7 of the Clayton Act (Section 18 of Title 15 U. S. Code) provided at the time in question in relevant part as follows:

"Sec. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other

share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Statement.

On March 1, 1962 a final judgment was entered in an action entitled *United States* v. *E. I. du Pont de Nemours, et al.*, in the District Court for the Northern District of Illinois, following two decisions of this Court reported at 353 U. S. 586 and 366 U. S. 316 which had found violations of Section 7 of the Clayton Act and ordered divestiture by du Pont of its stockholdings in General Motors Corporation.

Petitioners sue du Pont Company for damage inflicted on General Motors caused by du Pont's violation of the antitrust laws. The action is a derivative stockholders' suit.

The petition to the Court of Appeals summarized the complaint and the alleged damage to General Motors

(App. 7-8). Respondents did not take issue with the summary of the complaint in the petition.

As stated in the petition, there are fourteen enumerated claims of which the first eight are antitrust claims, charging violations of Section 7 of the Clayton Act as well as Sections 1 and 2 of the Sherman Act. The first, third, fifth and eighth claims relate to "vertical level" violations based upon du Pont's excluding, foreclosing or restraining producers and or suppliers other than du Pont from supplying General Motors' requirements for four different groups of products, namely, automotive fabrics and finishes, fluoride compounds, refrigerator finishes and tetraethyl lead.

The second, fourth, sixth and seventh claims relate to "horizontal level" violations of Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act with respect to these products in that du Pont excluded, foreclosed and restrained General Motors from competing with du Pont as a producer or a self-supplier of such products, some of which were invented by General Motors and appropriated by du Pont.

The ninth, tenth, eleventh and twelfth claims allege common law violations for breach of fiduciary duty by du Pont as dominant and controlling stockholder of General Motors.

The thirteenth count alleges a conspiracy between du Pont and General Motors acting under domination and control of du Pont regarding all of the aforesaid twelve claims.

All of these thirteen claims allege money damages.

A fourteenth claim is for an injunction.

Although General Motors is in reality the interested plaintiff, and only a nominal defendant, General Motors

has continued actively to support du Pont's attempt to avoid liability.

Respondents du Pont and General Motors pointed out to the Court of Appeals below that this is one of two pending actions in the Southern District. On motion of respondents and upon consent of plaintiff, the second of such actions (*Schiff* v. *General Motors and du Pont*, Civ. No. 63-533) was assigned to Judge Metzner for all purposes under Rule 2 of the District Court, just as the present action had previously been assigned to him for all purposes. Respondents, in opposing immediate appeal, pointed out to the Court of Appeals that the Schiff action "rais[ed] the same claims as are at issue here * * * by a plaintiff not a party to this action * * *."

After defendants' motion to assign the Schiff action to the same Judge, defendants then moved for additional time to answer, in effect a stay of the action, until a period following final determination of the present Gottesman action, and such motion was granted. Plaintiff Schiff filed a petition for writ of mandamus against the District Judge to require the District Judge to withdraw his order indefinitely extending the time of defendants to answer. On May 18, 1964 the petition for writ of mandamus was denied.

It is alleged in the Schiff action that plaintiff's stockholdings in General Motors date from 1936 or prior to that date. The District Court has previously found in this Gottesman action that stockholdings of plaintiffs go back only as far as May 4, 1950, and this fact is adverted to in the decision of the District Judge, upon which his order, the subject of this petition, is based. Thus, while this Gottesman action covers only a limited period of time, and the deposition-discovery proceedings will be correspondingly less extensive, the pending Schiff action, which alleges toll-

ing of statutes of limitations*, seeks relief of money damages under Section 7 of the Clayton Act for at least fourteen additional years during which the *prima facie* effect of the final judgment in the government suit will control, and for which years deposition-discovery proceedings will be available to show damage.

On April 15, 1964 Judge Metzner denied motions of petitioner Gottesman and plaintiff Schiff to consolidate the two actions pending before him. An appeal has been taken.

The decision herein of the District Judge was made September 18, 1963 (App. 17-25). His order dismissing Clayton Act claims as a matter of law was entered November 12, 1963 and contains the certificate pursuant to Section 1292(b) of 28 U. S. C. Within ten days thereafter and on November 21, 1963, petition for leave to appeal was filed in the Court of Appeals. The Court of Appeals without opinion denied the petition by order dated January 31, 1964 (App. 30-31). Within the time provided by Rule 25 of the Second Circuit and on February 14, 1964 petitioner filed a petition for rehearing *en banc* (App. 32-36). Six judges of the Court of Appeals disqualified themselves. On March 2, 1964 the petition for rehearing *en banc* was denied by decision of three judges of the Court of Appeals (App. 37).

The decision of the District Court holds "there can be no claim for money damages for a violation of Section 7" of the Clayton Act, and the order dismisses petitioner's claims for money damages under Section 7 of the Clayton Act as a matter of law. The decision and order hold that the final judgment entered in the government suit on March 1, 1962 can be introduced in evidence for historical purposes and as background material only. The decision and

* *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397; *Atlantic City Electric Co., et al.* v. *General Electric Co., et al.*, 2 Cir., 1962, 312 F. 2d 236, cert. den. 373 U. S. 909.

order hold that while du Pont "controlled" General Motors, such control did not extend past the area of fabrics and finishes.

Reasons For Granting the Writ.

Petitioners submit that a sweeping and novel interpretation of a federal statute, which will control in all respects the future of a long and complicated litigation, is a proper case for this Court first to consider and decide what standards should govern Courts of Appeal in applying the remedial provisions of Section 1292(b).

The district court has equated late divestiture, some four decades after acquisition, with an injunction to prevent the acquisition of stock. Acquisition prevented is damage prevented. Acquisition accomplished may be damage accomplished. Plaintiffs seek to prove damage after acquisition.*

In *Land* v. *Dollar*, 330 U. S. 731, 734, fn. 2, this Court stated:

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' United States *v.* General Motors Corp. 323 U. S. 373, 377."

and certiorari was granted "because of the importance of the question presented."

Since this Court has already found a violation of Section 7 of the Clayton Act, and since petitioners' burden of proof on behalf of General Motors depends directly upon litigation determined here involving Section 7 of the Clayton Act, it is obvious that the determination below by the District

* Assuming du Pont's domination resulted in charging prices higher than what the prices would have been in a truly competitive or "uninsulated" market, nevertheless, the district court has precluded recovery of any damages under Clayton 7.

Judge was "fundamental to the further conduct of the case."

In holding as a matter of law that there can be no claim for money damages for violation of Section 7 of the Clayton Act, the district court blocks at the threshold the proof which petitioners seek to offer showing that General Motors was injured as a result of du Pont's violation of that section. It is true, of course, that petitioners may still attempt to recover damages by proving (a) that du Pont violated Sections 1 and 2 of the Sherman Act, and (b) that General Motors suffered damages as a result of the violations of the Sherman Act (as distinguished from the Clayton Act). The burden of showing violation of the Clayton Act has already been carried. The policy of Congress will be frustrated if petitioners are required, in addition, to carry the different burden of the Sherman Act. For "not every violation of [7 [of the Clayton Act], as amended, would necessarily be a violation of the Sherman Act." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 355; *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 609-610.

While the district court is of the opinion that "the judgment in the government case dealt with the situation as of June 1949" (App. 24), the ultimate facts determined in the government case should still be available to prove petitioners' case in the instant action, either by showing that the judgment in the government case "dealt with" the situation as of a later date than June 1949, or by proof that du Pont and General Motors continued their arrangement and the business practices complained of by the government for many years subsequent to June 1949.*

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* It was not until 1959—10 years after the government case was started—that the first judgment was entered that ordered a change in some of these practices. Evidence in the government suit covered periods subsequent to 1949. (See partial schedule, App. 29). This Court relied on data of 1956 and 1957 in its first opinion in that case. 353 U. S. at 595-6.

The district court's decision is, therefore, "fundamental to the further conduct of the case," within the meaning of *Land* v. *Dollar*, *supra*, and *United States* v. *General Motors Corp.*, *supra*. If it remains uncorrected prior to trial, petitioners will be forced to try this case without getting any benefits whatever from the Court's decision in this most important case. 353 U. S. 321; 366 U. S. 316. If petitioners are compelled to follow this course and if petitioners are ultimately proven correct in their view that the district court's ruling is erroneous as a matter of law, it will be reversed upon appeal from the final judgment and the entire matter will have to be sent back for a new trial. All of this can be avoided if this Court should now consider the question.

But this case involves far more than an issue as to the conduct of the case. It involves the effectiveness of private remedies under the antitrust laws such as moved this Court's discretion in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, and *La Buy* v. *Howes Leather Co., Inc.*, 352 U. S. 249.

Moreover, this case involves a question where there is no guidance thus far for the Courts of Appeal in the exercise of their discretion in granting or denying appeals under Section 1292(b), and it is only this Court which can provide such guidance. *Di Bella* v. *United States*, 369 U. S. 121, and *Rea* v. *United States*, 350 U. S. 214. Both such cases were considered by this Court and determined because of their importance in the enforcement of federal law and remedies granted thereunder, and in order to furnish guidance to the Courts of Appeal in the future. Similarly, in *Barus* v. *Ohio*, 360 U. S. 252, this Court reviewed the propriety of the denial by the Supreme Court of Ohio of a motion for leave to appeal in *forma pauperis*.

The district court has not said that petitioners have failed to allege or prove injury or damage to General

Motors by du Pont. The district court has said that under the Clayton Act petitioners will not be permitted to allege or prove such damage.

At the times of the district court's decision and the denial of review by the Court of Appeals, the decision conflicted with *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464; *Radovich* v. *National Football League*, 352 U. S. 445, and *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U. S. 656, among others.

Now the decision below also conflicts with *Simpson* v. *Union Oil Company of California* decided by this Court April 20, 1964 (No. 87—October Term, 1963) and *United States* v. *Continental Oil Co.* decided May 4, 1964 (No. 834—October Term, 1963).

It is inconsistent in principle and in particularity with, *Rogers* v. *American Can Co.*, 3 Cir. 1962, 305 F. 2d 297, 318 (quoted *infra*, p. 18) which specifically upheld a complaint for damages under Section 7 of the Clayton Act as well as under the Sherman Act. In the first *du Pont* case, 353 U. S. at 592 and at 617, both the majority and minority of this Court approved the holding within the Second Circuit in *Ozdoba et al. (Ronald Fabrics)* v. *Vernon Brunswick Mills, Inc. et al.* (SDNY) 152 F. Supp. 136 that violation of Section 7 of the Clayton Act gave rise to a cause of action for damages. That case held (139):

> "In so far as these allegations relate to acquisition of stock, they are sufficient. This section is in the disjunctive and does not alone apply to substantial lessening of competition between the corporation whose stock was acquired and the corporation acquiring it, but also comprehends a situation where the effect of the acquisition is to restrain commerce or tend to create a monopoly. *Aluminum Co. of America* v. *Federal Trade Comm.*, 3 Cir., 284 F. 401, 406, 407; certiorari denied 261 U. S. 616."

Several courts, while discussing timeliness, have in effect recognized a right of action for money damages resulting from violation of Section 7 of the Clayton Act. See *e.g.*, *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15; *New Jersey Wood Finishing Company* v. *Minn. Mining & Mfg.*, 216 F. Supp. 507.

The district court here has held to the contrary, despite the fact that this Court used the past tense when it stated in its first decision that (353 U. S. 586, 588-589):

> "The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics *was achieved* on competitive merit alone, or because its acquisition of the General Motors Stock, and the consequent close inter-company relationship, *led* to insulation of most of the General Motors market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." [emphasis added]

This Court also used the past tense when it stated (p. 605):

> "The fact that sticks out in this voluminous record is that the bulk of du Pont's production *has always supplied* the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position *was promoted* by its stock interest and *was not gained* solely on competitive merit." (emphasis added)

As recently as April 6, 1964 in *United States* v. *El Paso Natural Gas Company, et al.*, (No. 94—October Term 1963) this Court reemphasized:

> "As we said in Brown Shoe Co. v. United States, 370 U. S. 294, 323: 'Congress used the words "*may* be substantially to lessen competition", [emphasis

> added] to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable, anti-competitive effect were to be proscribed by this Act.' See also United States *v.* Philadelphia National Bank, 374 U. S. 321, 362."

Thus, despite this Court's specific determination that the acquisition by du Pont of General Motors stock "led" to "insulation" of the market, the district court held in effect that the Clayton Act is concerned only with "ephemeral possibilities," and that no claim for actual damage may be entertained thereunder, or proof adduced to show damage thereunder, or that the "probability" of damage was actually realized.

Presently on this Court's docket (No. 402, October Term 1963) is *J. I. Case Co., et al.* v. *Borak* in which the Court of Appeals entertained an appeal under Section 1292(b) and determined that federal laws relating to proxy solicitation gave rise to a private cause of action for damage sustained. This Court has previously granted review of decisions where courts of appeal had granted appeals under Section 1292(b): See *Continental Grain Co.* v. *Barge F. B. L.-585*, 361 U. S. 811, 364 U. S. 19; *Schnell* v. *Peter Eckrich & Sons*, 364 U. S. 813, 365 U. S. 260, 261 n. 2. Section 1292(b) is referred to in the *Di Bella* case, *supra*, but not discussed.

In none of such cases has this Court considered the scope of interlocutory appeals, or in any way interpreted the statute for the benefit of the Courts of Appeal, or pointed to any criteria, or set forth any standards which

should govern the exercise by the respective appellate courts of their jurisdiction.*

It is respectfully submitted that this case, where the district judge has made the necessary certificate, and where a most important federal statute of substantive law is involved, presents a compelling instance of the necessity for this Court to give effect to the remedial intent of Congress in a uniform manner for the guidance of the Courts of Appeal.

If such petition is not to be granted after the denial of an interlocutory appeal, it will never be possible for this Court adequately to interpret the statute for the guidance of appellate courts.

Most recently, in *Simpson v. Union Oil of California*, (April 20, 1964, No. 87—October Term, 1963), this Court has held:

> "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed."
>
> . . . . . .
>
> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market and it matters not that the complainant may be only one merchant."

In the case at bar, it is not necessary to "assume" a violation. This Court has already held that du Pont did not acquire General Motors stock "solely for investment," and that the inference is "overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit."

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* There appear to be some three hundred cases which have already cited the section, but the Courts of Appeal are thus far without guidance from this Court and there appear to be no uniform criteria employed.

Therefore, in the words of Section 7, there has already been proven an actual "substantial lessening of competition." There has been "an impact on the market." This Court has held that the acquisition of stock "led" to "insulation" of the market, and du Pont's "commanding position" was "not gained solely on competitive merit."

The legal wrong has been proved. It remains to prove the "fact of damage" which was discussed in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562-563 as follows:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The district court has held that a divestiture decree, whether early or late, under Section 7 of the Clayton Act grants absolution for violations of law thereunder, and that an injured private party has no standing to prove the causation of damage—to prove that the damage was "the certain result of the wrong" in the language quoted above.

This is in square conflict with decisions of this Court in *Radovich* v. *National Football League*, *supra*, and *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, *supra*, at p. 660 where this Court stated:

> "Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them

> Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and * * * that plaintiff was damaged thereby are all that the law requires."

As this Court stated in *Times-Picayune Pub. Co.* v. *United States*, *supra*, at pp. 609-610:

> "* * * the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve * * *"

This Court has said that the "tests of illegality under the Sherman and Clayton Acts are complementary" and that "not every violation of §7 [of the Clayton Act], as amended, would necessarily be a violation of the Sherman Act." *United States* v. *Philadelphia National Bank*, *supra*, at p. 355. Since the Clayton Act is both more specific and complements the general policies of the Sherman Act, it is all the more astonishing to find that after this Court had decreed divestiture, a party claiming to be injured cannot be permitted to prove the injury under the Clayton Act. *Poller* v. *Columbia Broadcasting System*, *supra*, and *Simpson* v. *Union Oil Company of California*, *supra*. Indeed, at 366 U. S. 321, 323 this Court examined to see whether the relief was "effective to redress the antitrust violation proved," and decreed divestiture as the "competition-restoring" remedy.

The foreclosure of judicial inquiry under the Clayton Act on behalf of an injured party into more than four decades of domination of General Motors by du Pont certainly conflicts with the decision in *Rogers* v. *American Can Company*, *supra*, at p. 318, which stated:

> "The essence of the violation of §§1 and 2 of the Sherman Act and §7 and 8 of the Clayton Act, charged in the amended complaint, is that Canco and

> the defendant directors of M & T, under the influence of the other defendants, constituted a conspiracy to monopolize and restrain interstate trade and commerce in the purchase and sale of tinplate scrap and to lessen competition substantially by having Canco acquire the common stock of M & T and thereafter operate it either as a wholly owned subsidiary or as a division of Canco; by controlling the Board of Directors of M & T through the defendant directors named in the amended complaint; by the action of the defendants and Canco to insure the 'further entrenchment' of Canco as the principal supplier of tinplate scrap to M & T; and by using M & T and its major position in the market to fix the price of tinplate scrap across the United States."

See also *Kogan v. Schenley* (D. Del. 1956) 20 F. R. D. 4; *Ozdoba (Ronald Fabrics) v. Vorney Brunswick Mills, Inc., supra.*

The decision below has already been specifically criticized in a note: *Private Party Denied Cause of Action for Treble Damages for Violation of Section 7 of Clayton Act*, 64 Col. L. Rev. 597 (March 1964).

See also Note: *Standing to Sue for Treble Damages under Section 4 of the Clayton Act*, 64 Col. L. Rev. 570 (March 1964) wherein it is stated (585):

> "Attempting to resolve these conflicts, lower courts have limited the seemingly all-encompassing guarantee of Section 4 that 'any person . . . injured . . . by reason of' an antitrust violation may recover by restricting 'business and property' and 'by reason of' causation. The general tone of Supreme Court opinions by contrast, as evidenced by the *Radovich*, *Poller*, and other cases, has been in favor of liberal construction of the standing requirements by the lower courts. Its pronouncement that the statutory language sets the *only* requirements that

plaintiff must meet indicates that judicial glosses may be ill-founded." [footnotes omitted; see citations in *Simpson* v. *Union Oil Company of California*, *supra*.]

Even in the absence of an express grant by Congress of a remedy for injured private parties, this Court has suited the remedy to the evil to be prevented. *See Bell* v. *Hood*, 327 U. S. 678, 684; *Deckert* v. *Independence Shares Corp.*, 311 U. S. 272, 288; *Porter* v. *Warner Holding Co.*, 328 U. S. 395; *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U. S. 288, 291; and *Borak* v. *J. I. Case Co.*, (7 Cir., 1963) 317 F. 2d 538, cert. granted November 12, 1963, Docket No. 402.

Section 4 of the Clayton Act (15 U. S. C. 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The express grant of the right to sue for any injury for violation of the antitrust laws is wholly inconsistent with the action of the district court in blocking at the threshold any possibility of proof of injury under Section 7 of the Clayton Act.

In a different connection this Court said in *Brown Shoe Co.* v. *United States*, *supra*, at p. 322, fn. 37:

> "A number of the supporters of the amendments voiced their concern that passage of the bill would amount to locking the barn door after most of the horses had been stolen, but urged approval of the measure to prevent the theft of those still in the

> barn. Which was to say that, if particular industries had not yet been subject to the congressionally perceived trend toward concentration; adoption of the amendments was urged as a way of preventing the trend from reaching those industries as yet unaffected. See, e. g., 95 Cong. Rec. 11489, 11494, 11498 (remarks of Representatives Keating, Yates, Patman); 96 Cong. Rec. 16444 (remarks of Senators O'Mahoney, Murray)."

Here, the decision below holds, in effect, that although this Court locked the barn door with Section 7 of the Clayton Act, the label of that statute on the lock precludes any party from thereafter complaining that his horse was stolen during the previous four decades. A decree of divestiture is not a grant of immunity. *cf.: United States* v. *Weldon*, (No. 235—October Term, 1963, decided April 21, 1964).

To some extent, the district court may have been misled by confusing an illustration of domination and control with the ultimate fact of domination and control found by this Court. This Court illustrated the domination and control by referring to du Pont's "commanding position" as supplier of products in the field of automotive fabrics and finishes which "led" (past tense) to "insulation" of the market. This Court did not find that the power and influence of du Pont extended no farther than the buyers in General Motors' paint department. If control were so limited, competition could have been restored merely by requiring sealed competitive bidding for fabrics and finishes, rather than divestiture, or merely by enjoining du Pont from cultivating the friendship of personnel in General Motors paint department, as the "competition-restoring" remedy which would be "effective to redress the antitrust violation proved" 366 U. S. 321, 323. Du Pont could have continued to dominate the board of directors.

But in the first *du Pont* case, this Court did not confuse the illustrative products with the principle of the power to control the board of directors, for this Court said (592):

> "Judge Maris clearly stated in Transamerica Corp. *v.* Board of Governors, 3 Cir., 206 F. 2d 163-169:
>
> 'A monopoly involves the power * * * to exclude competition when the monopolist desires to do so.'"

By contrast, the district court held that where a statute permits nipping restraints in the bud, that *ipso facto* no bud previously could have flowered. It is as if the statute were instantaneously self-executing. The government remedy against incipiency was distorted to bar a private claim for actual damage. The district court held that monopoly power and restraint of trade are no longer cognizable if the government has achieved divestiture under the more specific standards of the Clayton Act.

At the very least, in the words of Section 1292(b) there is "substantial ground for difference of opinion" as to "controlling questions of law" arising under Section 7 of the Clayton Act. Only this Court can furnish guidance to the Courts of Appeal with respect to the exercise of their jurisdiction under this remedial statute.

Where a large and complex case is presented, especially a case under such an important provision of substantive law as Section 7 of the Clayton Act, it is clear that immediate appeal would materially advance the ultimate termination of the present litigation, and this Court should afford guidance to the Courts of Appeal in antitrust and other cases.

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

Dated: May 26, 1964

Respectfully submitted,

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APPENDIX.

Notice of Motion for Leave to Appeal.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

S. D. N. Y.—Civil No. 121-251.

RITA GOTTESMAN, *et al.*,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION AND E. I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

Notice of Motion for Leave to Appeal Pursuant to 28 U. S. C. 1292(b).

PLEASE TAKE NOTICE that upon the annexed Petition for Leave to Appeal, dated November 21, 1963, the annexed Opinion of the United States District Court for the Southern District of New York (Metzner, D. J.), dated September 18, 1963, the annexed Order of said District Court dated and filed November 12, 1963, containing the certification required by 28 U. S. C. 1292(b), the annexed Schedule of Exhibits, and upon all the papers heretofore filed and all proceedings heretofore had herein in the said District Court, the undersigned will move this Court at a time and place to be fixed by this Court at the United States Court House located at Foley Square, New York, N. Y., for the following relief:

(a) An order, pursuant to 28 U. S. C. 1292(b), granting leave to the petitioners to appeal to this Court from the order of the District Court filed November 12, 1963, on the ground that said order involves controlling questions of law as to which there are substantial grounds for dif-

ferences of opinion and an immediate appeal from said order may materially advance the ultimate termination of the litigation; and

(b) Such other, further and different relief as the Court may deem just and proper.

Dated: New York, N. Y.
November 21, 1963

Yours etc.

NETTER, NETTER, DOWD & FOX,
General Counsel for Petitioners,
Rita Gottesman *et al.*,
660 Madison Avenue,
———, New York, N. Y.

(To Attorneys of Record.)

Petition for Leave to Appeal Interlocutory Order.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

S. D. N. Y.—CIVIL No. 121-251.

RITA GOTTESMAN, *et al.*,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY,

Defendants.

Petitioners pray that this Court grant permission to take an interlocutory appeal to review the order of the United States District Court for the Southern District of New York entered on November 12, 1963 (Metzner, D. J.),

which said order, among other things, dismissed as a matter of law plaintiff's claims under Section 7 of the Clayton Act (15 U. S. C. §18) on the ground that such section does not provide a basis for either recovery of money damages or injunctive relief.

Opinion Below.

The opinion of the District Court dated September 18, 1963 is reported at 221 F. Supp. 488 and a copy is annexed hereto as Appendix A. The order of the Court below containing the certification required by U. S. C. Title 28, Section 1292(b) dated and filed November 12, 1963, is annexed hereto as Appendix B.

Jurisdiction.

This Court has jurisdiction under 28 U. S. C. §1292(b). This petition is filed within ten days of the entry of said Order on November 12, 1963.

Questions Presented.

Whether this Court should now review under 28 U. S. C. §1292(b) issues of first impression involving controlling questions of law as to which there is substantial ground for difference of opinion where an immediate appeal from the order may materially advance the ultimate termination of the litigation and will have far-reaching effects on the course of anti-trust litigation in this and other circuits. The issues include, among others, the following:

(1) Whether in this private anti-trust suit the Court below properly dismissed all of plaintiffs' claims under Section 7 of the Clayton Act on the ground that no claim for damages under the anti-trust laws may be founded upon violation of Section 7 of the Clayton Act, notwithstanding that in the prior Government anti-trust suit (*U. S.* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957)), on which

this suit is based, there were findings of fact that duPont used its 23% stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive fabrics and finishes, insulated most of the General Motors' market in said products from free competition, and controlled General Motors to that extent, and a conclusion of law that duPont had thereby violated Section 7 of the Clayton Act.

(2) Whether, in determining prior to trial the extent of the prima facie effect under Section 5(a) of the Clayton Act of the final judgment entered on March 1, 1962 in the above-mentioned Government suit, the Court below properly held that such final judgment dealt with the situation as of June 30, 1949, the date of the commencement of the Government suit, or whether, since proof in such Government suit was introduced as to events occurring subsequent to said date, said final judgment, the findings of fact and conclusions of law, should speak as of the last day of the period embraced by the evidence adduced at the trial of said Government suit.

Statutes Involved.

Section 1292(b) of Title 28, U.S. Code, provides as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for

an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951, C. 655, §49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770."

Section 4 of the Clayton Act (Section 15 of Title 15 U. S. Code) provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 5(a) of the Clayton Act (Section 16(a) of Title 15 U. S. Code) provides as follows:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceedings brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15a of this title."

Section 7 of the Clayton Act (Section 18 of Title 15 U. S. Code) provided at the time in question in relevant part as follows:

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

NATURE OF PROCEEDINGS

On June 30, 1949, the Government instituted suit against E. I. duPont & de Nemours & Co. *et al.*, alleging violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. During the pendency of said suit and subsequent to the Supreme Court's first decision therein

(353 U. S. 586, June 3, 1957), which reversed the Court below and held that duPont had violated Section 7 of the Clayton Act and remanded the case to the District Court for relief, the original complaints in this action, which were based primarily upon the Government suit, were filed.

On November 10, 1959, the amended consolidated complaint, which is presently before the Court, was filed. The Supreme Court considered the Government case again upon an appeal from the District Court's order of relief. In its decision of May 22, 1961 (366 U. S. 316), which again reversed the Court below, the Supreme Court clarified its original opinion. The final judgment of the District Court of March 1, 1962, the opinion of the District Court of even date rendered in connection therewith and the further order of that Court dated March 14, 1962 dismissed *without prejudice* the Government's Sherman Act claims on the ground that they had been rendered *moot* by the Supreme Court's ruling that Section 7 of the Clayton Act had been violated (C. C. H. 1962 Trade Cases ¶70,245).

This is a derivative action brought by stockholders of General Motors Corporation alleging claims on behalf of that corporation against E. I. duPont de Nemours & Co. It seeks recovery for damages and other relief on behalf of General Motors.

There are fourteen enumerated claims, of which the first eight are antitrust claims, charging violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The first, third, fifth and eighth claims relate to "vertical level" violations based upon duPont's excluding, foreclosing or restraining producers and or suppliers other than duPont from supplying General Motors' requirements for four different groups of products, namely, automotive fabrics and finishes, fluoride compounds, refrigerator finishes and tetraethyl lead.

The second, fourth, sixth and seventh claims relate to "horizontal level" violations with respect to these products, in that duPont excluded, foreclosed and restrained General

Motors from competing with duPont as a producer or a self-supplier of such products.

The ninth, tenth, eleventh and twelfth claims allege common law violations for breach of fiduciary duty by duPont as dominant and controlling stockholder of General Motors.

The thirteenth alleges a conspiracy between duPont and General Motors acting under domination and control of duPont regarding all of the aforesaid twelve claims. All of these thirteen claims seek money damages.

The fourteenth claim is an action for an injunction based on the facts set forth in the first thirteen claims.

Judge Metzner was designated at an early stage of the proceedings to act as the single judge in this case.

During the course of pre-trial proceedings the Court below requested argument and the submission of memoranda as to the validity of the claims for damages predicated upon a violation of Section 7 of the Clayton Act, and also as to the application of Section 5(a) of the Clayton Act to the final judgment dated March 1, 1962 in the aforementioned Government case.

Paragraph 4 of the order from which plaintiffs now seek to appeal dismisses plaintiffs' claims under Section 7 of the Clayton Act as a matter of law on the ground that such claims do not constitute a basis for either injunctive relief or recovery of money damages. The effect of such ruling is the same as if defendants had successfully moved to dismiss such claims under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. It follows, therefore, that for the purpose of considering the ruling dismissing the Clayton Act claims, the allegations of the amended consolidated complaint are deemed to be true. (*Rogers* v. *American Can Co.* (C. A. 3rd, 1962), 305 F. 2d 297, 318).

Petition for Leave to Appeal Interlocutory Order.

REASONS FOR GRANTING THIS APPEAL.

In granting the necessary certificate under 28 U. S. C. 1292(b) the Court below held that the provisions of the order sought to be appealed from involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Where there is no substantial ground for difference of opinion, the certification by the Court below can, of course, be rejected by this Court, as was previously done in this very case, *Gottesman* v. *General Motors* (C. A. 2nd 1959, 268 F. 2d 194). There, defendants sought an interlocutory appeal from a *denial* by the Court below of a motion to dismiss the complaint.* This Court's reluctance to permit an interlocutory appeal there was also due to the fact it believed for the reasons expressed in its opinion that an immediate appeal from such a pre-trial ruling in the pleading stage would not materially advance the ultimate termination of the litigation. This is to be distinguished from the instant situation, where the Court below *dismissed* the Clayton Act claims as a matter of law. (See *Jaffer Corp.* v. *Randolph Mills*, C. A. 2nd (1960) 282 F. 2nd 508, where this Court permitted an interlocutory appeal from an order sustaining a motion to dismiss.) We shall show that an immediate appeal from such an order may materially advance the ultimate termination of this litigation. As will be further indicated, there is substantial ground for a difference of opinion with respect to the rulings of the Court below sought to be appealed by the petitioner herein.

This Court has held in *Brown* v. *Bullock* (C. A. 2nd, 1961), 294 Fed. 2nd 415, 417, that it should exercise its dis-

* It should be noted that although defendants herein attacked the complaint, they did not contend, at such time, that an action for damages did not lie under Section 7 of the Clayton Act.

cretion to permit an interlocutory appeal under Section 1292(b) where the following factors are present:—

(1) An issue of first impression in this circuit is involved;

(2) The decision is likely to have precedential value for a number of other suits; and

(3) To shorten an otherwise lengthy trial.

Each of these factors is present in the instant situation. The Court below ruled that under no circumstances could a plaintiff recover damages under the antitrust laws for a violation of Section 7 of the Clayton Act. As the Court pointed out, neither the parties nor the Court could find any cases directly on the subject. Although there have been other cases in which complaints with respect to similar claims were sustained as a matter of law (*see Rogers* v. *American Can Co.* (C. A. 3rd, 1962) 305 F. 2d 297; *Kogan* v. *Schenley* (D. Del. 1956) 20 F. R. D. 4; *Ozdoba* v. *Verney Brunswick Mills, Inc.* (S. D. N. Y., 1946) 152 F. Supp. 136), in none of them was the specific question here involved raised.

Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws* may sue therefor • • • and shall recover threefold the damages by him sustained • • •" (emphasis supplied).

It is apparent that there is no language in Section 4 which prohibits a private suit for treble damages under Section 7 of the Clayton Act. In fact Section 4 clearly authorizes such suit by an injured party for *any* violation of said laws.

While not desiring to present fully at this time the merits of their position with respect to the questions which would be argued in the event this Court grants leave to appeal, petitioners believe it appropriate to point out the fundamental errors in the reasoning upon which the Court below based its conclusions, in order to demonstrate that

there is a substantial ground for difference of opinion as to such questions.

The Court below equated the Sherman Act with actual restraints and resultant damage for which recovery could be had, but failed to conceive that violations of Section 7 of the Clayton Act likewise could be based upon actual restraints resulting in damages for which recovery similarly could be had.

Obviously there can be no actual restraints where suit is instituted by the Government immediately upon notice of a contemplated merger, stock acquisition or the like, or shortly after the transaction is completed. Prior to the first decision of the Supreme Court in *U. S. v. duPont, supra*, it was commonly thought that Section 7 of the Clayton Act applied only to that situation and not to one where a substantial period of time elapses between the transaction and the commencement of Government suit during which time actual restraints occur. In said decision, the Supreme Court held that there could be violations of Section 7 with or without restraints (p. 589), and that the latter situation as well as the former came within its ambit.

The conclusion reached in the Government suit that there was a reasonable probability that there would be a monopoly or a substantial lessening of competition in the future was clearly based upon the finding that there had been actual restraints in the past which, according to the Supreme Court, resulted from the illegal *use* of duPont's stock interest in General Motors. What better barometer could there be as to the probabilities of the future than duPont's own past conduct?

The Supreme Court's holding that duPont had violated Section 7 of the Clayton Act was based on duPont's conduct and activities during the prior thirty year period during which it continued to hold and "use" its stock interest in General Motors—to achieve primacy for itself as General Motors' supplier of automotive fabrics and finishes, and to control General Motors to that end.

Petition for Leave to Appeal-Interlocutory Order.

While the Court below recognized that the Supreme Court had so held (see par. 1(f) of the order below) it refused to recognize that in effect such illegal conduct actually did restrain.

The Court below refers to the fact that the Supreme Court answered in the *affirmative* the primary question before it as follows:

> "whether duPont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved . . . because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, *led to the insulation of most of the General Motors' market from free competition*, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce. 353 U. S. at 588-89". (italics supplied).

But, says the Court below, the Supreme Court "did not find from such 'insulation' that actual restraints had yet occurred." Here, too, the Court below erred. Obviously, a finding that duPont's illegal conduct resulted in "the insulation of most of the General Motors' market from free competition" is nothing more or less than a finding that there were actual restraints.

Moreover, the Court below again erred in concluding that the fact that the Supreme Court did not decide the Government's Sherman Act claims on the merits was due to its inability to find actual restraints. It was logical for the Supreme Court to pass on the Clayton 7 claims before the Sherman Act claims, thereby avoiding such troublesome questions as intent, conspiracy etc. which had arisen in connection with the latter but which had no bearing on the former. The aforementioned second opinion of the Supreme Court, the final judgment of March 1, 1962 of the District Court and its order of March 14, 1962 rendered in connection therewith, make it clear, if it was not clear before, that having already decided that duPont had violated Section 7 of the Clayton Act, the Supreme Court

believed it to be *unnecessary* to pass on the Sherman Act questions and treated them as *moot*. Consequently, such claims were dismissed "*without prejudice*" under the authority of *U. S. v. Mausingwear*, 340 U. S. 36 (1950).

We shall now treat with the question as to whether an immediate appeal may materially advance the ultimate termination of this litigation.

The ultimate determination of this suit, to say nothing of consequence to other litigation not presently before this Court but which is profoundly affected by the novel and sweeping decision below, will be delayed immeasurably unless an immediate appeal is granted. The delay in the present case arises because of the differences in the matters to be proved under the respective statutes. Congress determined upon a different burden of proof under the Clayton Act from that under the Sherman Act. The latter includes intent, conspiracy and the like. The Supreme Court in its first decision in the Government suit, *supra*, affirmed that Congress did not require that these elements be proven under Section 7 of the Clayton Act. In the event that this Court determines now the theory upon and the statute under which plaintiffs may proceed, a single trial on all issues may be had—materially advancing the ultimate termination of the litigation. In the event such appeal is not heard now, but rather upon conclusion of a first trial, a second extensive trial is highly probable.

It is even conceivable that if this Court should affirm on immediate appeal, the plaintiffs would find, after full pre-trial proceedings, that the burden of proof could not be sustained under the Sherman Act, requiring abandonment of the antitrust claims. Thus, present determination of the question will probably shorten an otherwise lengthy trial and may also avoid a multiplicity of trials. On the other hand, should this Court reverse on immediate appeal, the plaintiffs could determine to try only the Clayton Act, and not the Sherman Act claims. This also would shorten the trial considerably.

As a case of first impression, controlling this as well as other litigation, petitioners' appeal therefore falls squarely within the criteria set by this Court, sitting *en banc*, in *Brown* v. *Bullock*, *supra*.

An immediate appeal should likewise be permitted with respect to the second issue set forth above.

Should this Court deny leave to take an immediate appeal, plaintiffs would be required to try the instant suit without any *prima facie* benefits of Section 5(a). Then, if there were a dismissal at the end of the presentation of their case, and on plaintiffs' appeal from the final judgment, this Court were to reverse and hold that plaintiffs are entitled to the *prima facie* benefits of Section 5(a), a new trial would be required. Obviously, this would substantially delay the ultimate termination of this litigation.

The instant situation should not be treated as though the applicability of Section 5(a) had been determined for the first time during the course of the trial of this suit. Having been determined prior to trial, the possibility of a wasted trial and a prolonged delay caused by a second trial should be averted by permitting an immediate appeal.

The fact that there is a substantial ground for difference of opinion as to a controlling question of law is also clear. In determining the extent of the *prima facie* effect under Section 5(a) of the Clayton Act of the final judgment entered on March 1, 1962 in the aforesaid Government suit, the Court below cited the decision of the Court of Appeals, First Circuit, in *International Shoe Machinery Corp.* v. *United Shoe Machinery Corp.* (1963), 315 Fed. 2nd 449, cert. denied 32 U. S. L. Week 3127 (Oct. 14, 1963), as authority in support of its holding. Actually this case sustains the position asserted by the plaintiffs herein that wherever proof in the prior Government suit was introduced as to events occurring subsequent to the date of the commencement of such suit, the final judgment should speak as of the last date of the period embraced by the evidence adduced at the trial.

There is no doubt that evidence may be adduced at the trial of suits for violation of Section 7 of the Clayton Act as to events subsequent to the date of commencement of the suit. This was done in *Brown Shoe Co.* v. *United States* (1962) 370 U. S. 294, as an examination of the Supreme Court's opinion in that case will show (see pgs. 301-304). In that case findings were made on the basis of such evidence. This is likewise true in the Government suit against duPont (see schedule annexed hereto as appendix "C", which sets forth only certain exhibits which plaintiffs were able in the limited time available to them to cull out of the tremendous record in the Government suit). As a matter of fact the opinion in the Government case against duPont indicates that the Supreme Court itself took judicial notice of facts which occurred in years subsequent to the commencement of the suit. (See 353 U. S. at page 586 and footnote 16 and page 596.)

It is clear from the foregoing that for the purposes of Clayton Act (5(a)) decrees in Government antitrust suits for violation of Section 7 of the Clayton Act speak as of the last day of the period embraced by the evidence adduced at the trial. As stated in *International Shoe Machinery Corp.* v. *U. S. Shoe Machinery Corp.*, *supra*, this period could conceivably extend to the date of the closing of evidence. In the Government suit against duPont such date was June 29, 1956.

As indicated in paragraph 3 of the order sought to be appealed from, the Court below has already held that "the present plaintiffs may only recover damages for acts occurring after May 4, 1950". Therefore, if this Court does not grant leave to the plaintiffs to appeal from the decision of the Court below that "the judgment in the said Government suit speaks as of June 30, 1949" (the date of the commencement of the Government suit), the effect will be that the plaintiffs herein will be denied any use whatsoever under Section 5(a) of the final judgment in the Government suit, except for historical and background purposes.

Thus, there is a square conflict between the opinion of the First Circuit in the *International Shoe Co.* case, *supra*, and the decision below, fully justifying an immediate appeal on this controlling question.

Moreover, the purpose and intent of Congress in enacting Section 5(a) of the Clayton Act was to facilitate and encourage the institution of private antitrust suits for treble damages after a favorable decision in a prior Government suit, by minimizing plaintiffs' burdens of proof and expenses. (*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951)). This purpose will be frustrated in its application to the instant case if plaintiffs are now denied leave to prosecute an immediate appeal, and it should later appear, after an expensive and prolonged trial of this complicated litigation, that plaintiffs were entitled to the benefits of Section 5(a).

Conclusion.

The interests of the trial court and of this appellate court as well as of the parties in this and other private antitrust suits will be best served by permitting an immediate appeal in furtherance of the intent of Congress and the certificate of the District Judge.

Dated: New York, New York.
November 21, 1963.

Respectfully submitted,

Netter, Netter, Dowd & Fox,
Attorneys for Petitioners.

Of counsel:

Gordon, Brady, Caffrey & Keller,
O'Connor & Farber,
Edward Rothenberg,
Abbott Gould,
Clendon Lee,
Jay Miller.

Decision of District Judge.

Appendix A to Petition for Leave to Appeal.

METZNER, District Judge.

Plaintiffs are minority stockholders of General Motors Corporation who have based this derivative action against duPont and General Motors primarily on matters involved in the government antitrust suit against these corporations and U. S. Rubber Co. United States *v.* E. I. du Pont de Nemours & Co., 353 U. S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957). The final judgment in that case, entered on March 1, 1962, dismissed without prejudice the claims alleging violations of the Sherman Act, and adjudicated that du Pont's acquisition of General Motors stock violated section 7, of the Clayton Act. In their complaint, plaintiffs have quoted at length from the above decision of the Supreme Court in the government suit, relying on section 5(a) of the Clayton Act, 15 U. S. C. §16(a).

It is the usual practice in a private Sherman Act litigation to defer a determination as to the effect to be given under section 5(a) to a prior government judgment until the deposition-discovery proceedings have been completed, and court and counsel are ready to frame the issues for trial. See, e. g., Alamo Theatre Co. *v.* Loew's, I. c., 143 F. Supp. 419 (N. D. Ill. 1956). However, a different approach is necessary in this case in order to define the scope of deposition-discovery procedures. The complaint alleges and seeks recovery for both Sherman Act and Clayton Act violations. Since the government judgment was predicated solely on a violation of section 7 of the Clayton Act, serious questions arise as to the solace available to plaintiffs from that judgment. Section 7 condemns acts that have a reasonable *tendency to result* in violations of the Sherman Act. The latter act speaks of actual restraints and monopolies. As the Supreme Court pointed out,

> "The Clayton Act was intended to supplement the Sherman Act. * * * Its aim was primarily to arrest apprehended consequences of intercorporate relationships *before those relationships could work their evil*, which may be at or any time after the acquisition, depending upon the circumstances of the particular case." 353 U. S. at 597, 77 S. Ct. at 879, 1 L. Ed. 2d 1057. (Emphasis supplied).

Therefore a ruling on the availability to these plaintiffs of the judgment in the government suit is important to advise plaintiffs of the extent to which they must rely on independent evidence to prove their case.

Furthermore, and independent of the applicability of section 5(a), there is the question whether recovery of money damages may be had for a violation of section 7 of the Clayton Act.

I

Section 5(a) of the Clayton Act, 15 U. S. C. 16(a), provides:

> "A final judgment or decree * * * hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment or decree would be an estopped as between the parties thereto".

The Supreme Court has held that section 5(a) adopts the general principles of collateral estoppel. Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951)

> "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. * * * In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." 340 U. S. at 569, 71 S. Ct. at 414, 95 L. Ed. 534.

Subsequent cases have held that this rule is applicable when the government suit was a civil suit. Eagle Lion Studios, Inc. *v.* Loew's, Inc., 248 F. 2d 438 (2d Cir. 1957), aff'd by an equally divided Court, 358 U. S. 100, 79 S. Ct. 218, 3 L. Ed. 2d 147 (1958); Webster Rosewood Corp. *v.* Schine Chain Theatres, Inc., 263 F. 2d 533 (2d Cir.), cert. denied, 360 U. S. 912, 79 S. Ct. 1296, 3 L. Ed. 2d 1261 (1959); Richfield Oil Corp. *v.* Karseal Corp., 271 F. 2d 709 (9th Cir. 1959), cert. denied, 361 U. S. 961, 80 S. Ct. 590, 4 L. Ed. 2d 543 (1960).

Judge Learned Hand in the case of The Evergreens *v.* Nunan, 141 F. 2d 927, 152 A. L. R. 1187 (2d Cir.), cert. denied, 323 U. S. 729, 65 S. Ct. 49, 89 L. Ed. 579 (1944), drew a distinction between ultimate facts and mediate data. Ultimate facts are those essential to the decision and "upon whose combined occurrence the law raises the duty, or the right, in question". Mediate data are facts "from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right." 141 F. 2d at 928.

In Yates *v.* United States, 354 U. S. 298, 338, 77 S. Ct. 1064, 1087, 1 L. Ed. 2d 1356 (1957), the Court held that:

> "... a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. The Evergreens *v.* Nunan, 141 F. 2d 927, 152

A. L. R. 1187; Restatement, Judgments 68, comment p."

Furthermore, in Eagle Lion Studios, Inc. *v.* Loew's, Inc., supra, the court held that inferences may not be drawn from the prior judgment since the court is circumscribed under section 5(a) by the narrow limits of the estopped doctrine.

From the above cases I conclude that only ultimate facts determined in the first suit are prima facie evidence of ultimate facts in the second suit. While the holding in Zuckerman *v.* E. I. du Pont de Nemours & Co., 1955 Trade Cas. ¶68022 (S. D. N. Y. 1955), is to the contrary, it was apparently rejected by the subsequent decision in the Eagle Lion case, supra.

II

We come then to the question of what ultimate facts were determined by the judgment in the government suit.

The main thrust of the government suit was alleged violations of sections 1 and 2 of the Sherman Act by the principal corporate defendants, General Motors, du Pont, and U. S. Rubber. This is evident from the proportion of the record devoted to the Sherman Act violations and from the briefs submitted and argument both in the district court and in the Supreme Court. There was, however, an allegation in the complaint that the acquisition by du Pont of General Motors stock violated section 7 of the Clayton Act. The Supreme Court saw fit to reverse the judgment of dismissal solely on a determination that a violation of section 7 of the Clayton Act had been proven. The Court said:

> "In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act." 353 U. S. at 588 n. 5, 77 S. Ct. at 875, 1 L. Ed. 2d 1057.

Decision of District Judge.

The Court pointed out that section 7 makes illegal the acquisition by one corporation of stock of another corporation where the effect of such acquisition may be (1) to substantially lessen competition between the two corporations, or (2) to restrain commerce in any section or community, or (3) to tend to create a monopoly of any line of commerce. The government's complaint only alleged that the effect of the acquisition was "to tend to create a monopoly in particular lines of commerce."

The Court held that there was, at the time of suit, reasonable probability of the creation of a monopoly in automotive fabrics and finishes.

The facts found by the Court, necessary to that judgment, were: that du Pont acquired 23 per cent of the stock of General Motors, which acquisition was not solely for investment; that automotive finishes and fabrics constitute a substantial "relevant market" within the meaning of the Clayton Act; that General Motors' share of that market was substantial; that du Pont supplied a substantial share of that market; that du Pont used its stock interest to entrench itself as the primary supplier to General Motors of automotive fabrics and finishes.

Plaintiffs contend that the Supreme Court further found that du Pont "controlled" General Motors, and that this fact of control may be taken as prima facie evidence with respect to all their antitrust claims, not merely those involving automotive fabrics and finishes. While there is language in the opinion indicating that du Pont "controlled" General Motors, it appears only in the context of the finding that du Pont used its stock ownership as set forth above. In the instant suit plaintiffs must prove, without reliance on the government judgment as prima facie evidence, that the stock ownership was used to gain a position as primary supplier in other lines of commerce.

Plaintiffs have included in their briefs several quotations from the first and second decisions of the Supreme Court, and from Judge LaBuy's opinion of March 1, 1962.

which they contend constitute findings of fact that are prima facie evidence in their favor in this litigation. However, statements of the Supreme Court that do not constitute facts *necessary* to its decision are not to be taken as facts prima facie determined in the private suit. Furthermore, the only time any question of liability was before the Court was on the first appeal. Thus language of the Court on the second appeal in 1961, and Judge LaBuy's opinion in connection with the final judgment entered on March 1, 1962, cannot constitute findings of fact on which a determination of liability was based in 1957.

Plaintiffs strongly urge that the Supreme Court found actual restraints of trade, and that the fact of such restraints is prima facie established for the instant case. The opinions of the Court do speak of restraint and monopoly, but only with regard to the finding of a Clayton Act violation. Specifically, the Court answered in the affirmative the question

> "whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved * * * because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." 353 U. S. at 588-589, 77 S. Ct. at 875, 1 L. Ed. 2d 1057.

Plaintiffs rely heavily on the use of the word "insulation" in this quotation. However, the significance of this word is limited by the context in which it appears, that is, from it the Court concluded that a monopoly was likely to result. The Court did not find from such "insulation" that actual restraint of trade or monopolization had yet occurred.

If the Court had found actual restraint or monopoly, it would have been a simple matter to have reversed the entire

judgment and afforded relief under the Sherman Act. However, the Court was specific in refusing to review the dismissal of the Sherman Act claims. Therefore I conclude that no reference in the Court's opinion to restraint and monopoly can be used to support plaintiffs' claims in this suit.

It seems too obvious to require discussion that facts on which a finding of a violation of the Clayton Act is based are insufficient to support a finding of a violation of the Sherman Act, since the Clayton Act was intended to catch potential Sherman Act violations in their incipiency. "Incipiency" denotes "any time when the acquisition threatens to ripen into a prohibited effect." United States v. E. I. du Pont de Nemours & Co., supra, 353 U. S. at 597, 77 S. Ct. at 879, 1 L. Ed. 2d 1057.

III

We come now to the question of what use plaintiffs may make of these ultimate facts.

Plaintiffs have alleged eight antitrust claims, each charging du Pont with having violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The prayer for relief demands treble damages and an injunction. Insofar as the Clayton Act is concerned, the injunctive relief sought has already been granted in the government suit. There remains, therefore, only the possibility of the recovery of damages.

No case has been found discussing the question whether damages can be recovered for a violation of section 7 of the Clayton Act, and no case has been found where damages have been awarded for such a violation. The cases of Kogan v. Schenley Industries, Inc., 20 F. R. D. 4 (D. Del. 1956), and Ozdoba v. Victory Brunswick Mills, Inc., 152 F. Supp. 126 (S. D. N. Y. 1946), are not in point. In the Kogan case the court was concerned solely with the ques-

tion whether a minority stockholder could maintain a derivative suit for an antitrust violation. In the Ozoloba case it is not clear that damages were requested for the alleged section 7 violations, since the action was described by the court as one for treble damages and an injunction for alleged violations of the Sherman and Clayton Acts, and in any event the court did not discuss the problem. The test of a section 7 violation is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." United States *v.* E. I. du Pont de Nemours & Co., supra, 353 U. S. at 607, 77 S. Ct. at 884, 1 L. Ed. 2d 1057. Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.

IV

We come next to the Sherman Act claims in this complaint. Here plaintiffs are met with the well-settled rule that a decree is an estoppel only as to the time with which it dealt. International Shoe Mach. Corp. *v.* United Shoe Mach. Corp., 315 F. 2d 449 (1st Cir. 1963); Webster Rosewood Corp. *v.* Schine Chain Theatres, Inc., supra; Park Nonpareil Corp. *v.* Smith, 258 F. 2d 452 (1st Cir. 1958); Orbo Theatre Corp. *v.* Loew's, Inc., 156 F. Supp. 779 (D. D. C. 1957), aff'd per curiam, 104 U. S. App. D. C. 262, 261 F. 2d 380 (1958), cert. denied, 359 U. S. 943, 79 S. Ct. 725, 3 L. Ed. 2 d 677 (1959); Basle Theatres, Inc. *v.* Warner Bros. Pictures Distrib. Corp., 168 F. Supp. 553 (W. D. Pa. 1958); see Theatre Enterprises, Inc. *v.* Paramount Film Distrib. Corp., 346 U. S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954); cf. Bordonaro Bros. Theatres, Inc. *v.* Paramount Pictures, Inc., 203 F. 2d 676, 678 (2d Cir. 1953).

The judgment in the government case dealt with the situation as of June 1949. It has already been held that the present plaintiffs may only recover damages for acts occur-

ring after May 4th, 1950. Since plaintiffs are concerned with a different time period, the government judgment is not available to them.

Plaintiffs contend that there is a presumption of continuance of unlawful conduct, on which they may rely to establish that du Pont continued the conduct on which the Supreme Court's decision was based at least until 1959 when the first judgment was entered that ordered a change in some of these practices. However, the cases on which plaintiffs rely dealt with criminal conspiracies, which are deemed to continue until abandonment or success. E. g., United States *v.* Kissel, 218 U. S. 601, 608, 31 S. Ct. 124, 54 L. Ed. 1168 (1910); Hyde *v.* United States, 225 U. S. 347, 32 S. Ct. 793, 56 L. Ed. 1114 (1912); Marino *v.* United States, 91 F. 2d 691, 113 A. L. R. 975 (9th Cir. 1937). The antitrust claims in this case do not involve a conspiracy, and the rule for which plaintiffs contend does not apply. Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America *v.* United States, 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804 (1934), also relied on by plaintiffs, was a civil antitrust suit subsequent to a criminal conviction. The Court held not that a presumption of continuance exists, but rather that there is *no* presumption that criminal conduct has been *abandoned* after the filing of an indictment.

It may be that plaintiffs may introduce in evidence the decree in the government suit, for historical purposes and background material, which is proper under the usual procedures in antitrust litigation, especially if the case is tried before the court without a jury. Cf. International Shoe Mach. Corp. *v.* United Shoe Mach. Corp., supra. Plaintiffs, however, will have to submit other proof of the existence of the facts on which they base their claims. Settle order.

Order of District Court.

Appendix B to Petition for Leave to Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RITA GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER,
Plaintiffs,

against

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,
Defendants.

Pretrial Order
Civ. 121-251

The Court having considered the memoranda of the parties and having heard argument by counsel as to the application in this action of Section 5(a) of the Clayton Act (15 U. S. C. §16) to the final judgment in *United States v. E. I. du Pont de Nemours & Company* (United States District Court, Northern District of Illinois, Eastern Division, entered March 1, 1962, Civil Action No. 49 C 1071) and as to the significance of the violation of Section 7 of the Clayton Act alleged in the Amended Consolidated Complaint, and having rendered an opinion thereon dated September 18, 1963:

IT IS ORDERED THAT:

(1) The only ultimate facts determined by the court in the case of *United States v. E. I. du Pont de Nemours & Co. et al.* (United States District Court, Northern District of Illinois, Eastern Division, Civil Action No. 49 C 1071) which were necessary to the final judgment entered on March 1, 1962 were:

(a) that du Pont acquired 23% of the stock of General Motors;

(b) that automotive finishes and fabrics constitute a substantial "relevant market" within the meaning of the Clayton Act;

(c) that said acquisition of stock by du Pont was not solely for investment;

(d) that General Motors' share of the "relevant market" for automotive finishes and fabrics was substantial;

(e) that du Pont supplied a substantial share of that market;

(f) that du Pont used its stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive finishes and fabrics and that du Pont controlled General Motors to that extent.

(2) Only the ultimate facts necessary to said final judgment determined in said Government suit, as provided in paragraph 1 above, are prima facie evidence of ultimate facts in this suit.

(3) The final judgment entered March 1, 1962 in said Government suit may be introduced in evidence on the trial of this action for historical purposes and as background material. The judgment in the said Government suit speaks as of June 30, 1949. The present plaintiffs may only recover damages for acts occurring after May 4, 1950.

(4) Plaintiffs' claims under Section 7 of the Clayton Act do not constitute a basis for either injunctive relief or recovery of money damages in this action, and such claims are hereby dismissed as a matter of law.

Order of District Court.

(5) Pursuant to 28 U. S. C., Section 1292(b), it is hereby certified that the foregoing provisions of this order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Dated: New York, N. Y.
November 12, 1963.

CHARLES M. METZNER /s
U. S. D. J.

Schedule of Exhibits Extending to Periods of Time Subsequent to June, 1949.

Appendix C to Petition for Leave to Appeal.

Exhibit No.	Description	Transcript Page
DP-307	General Motors Corporation Production Records, duPont Departmental Trade Records, re: Dollar Sales of Coated Fabrics to G. M. Truck & Coach Division, 1944-1950	V 95, 8388-8389, V126, 11694
DP-308	G. M. Corp. Production Records, Dupont Departmental Trade Records re: Yardage Sales of Coated Fabrics to G. M. Truck & Coach Division 1944 to 1950	V95, 8388-8389 V126, 11694 V140, 12908-9, 12931-2
DP-311	G. M. Corp. Production Records re: Dollar Sales of Coated Fabrics to Chevrolet Commercial Body Division, 1931 to 1950	V95, 8405-8409 V126, 11697
DP-312	G. M. Motors Corp. Production Records re: Yardage Sales of Coated Fabrics to Chevrolet Commercial Body Division, 1931 to 1950	V95, 8405-8409 V126, 11694
DP-352	Excerpt re: Trade Report covering visit of J. D. O'Donnell to Frigidaire on 9-14-50	V98, 8757-8759, 8780, V99, 8817
DP-480	Fabrics Routine Trade Report dated 6-19-50	V126, 11678-11679
DP-491	Fabrics Division Trade Report—Trade analysis dated 2-28-51	V126, 11711
DP-522	Tabulation of duPont Sales of Pyralin 1946-1950	V130, 12062-64
DP-451	Report of duPont Sales of Products which were new to the Co. since 1928—year 1950	V130, 12029-12033
DP-557	Fabrics Industrial Master Trade Report 1-12-50	Vol. 144, 13068-70 13084
DP-563	Excerpt from 1950 Annual Market Survey of Fabrics & Finishes Dept.	Vol. 144, 13269-70
DP-349	Excerpt re: Trade Report covering visit of J. D. O'Donnell to Frigidaire on 8-1-50	V99, 8814-8816
GM-10	GM Board of Directors on various dates including February 1, 1951	Vol. 5488-5494, 5504-5505
GM-24	List of members of GM Operation Policy Committee June 3, 1946 to Feb. 1, 1953	V58, 5059-5061
GM-25	List of members of GM Financial Policy Committee, June 3, 1946 to Feb. 1, 1953	V58, 5062-5066
GT-1286	Excerpt from Annual Market Survey 1950	V11, 696 Testi-

Denial of Motion for Leave to Appeal.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

GOTTESMAN *et al.*,

v.

GENERAL MOTORS CORP. and E. I. DU PONT DE NEMOURS & Co.

Before SWAN, SMITH, and MARSHALL, Circuit Judges.

Motion for leave to appeal from an interlocutory order.

Motion denied.

T. W. S.,

J. J. S.,

T. M.,

C. JJ.

January 31, 1964

Order Denying Motion for Leave to Appeal.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of January, one thousand nine hundred and sixty-four.

Present:

Hon. THOMAS W. SWAN,
Hon. J. JOSEPH SMITH,
Hon. THURGOOD MARSHALL,
Circuit Judges.

RITA GOTTESMAN, *et al.*,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

A motion having been made herein by counsel for the plaintiffs for leave to appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO,

Petition for Rehearing *En Banc*.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

S. D. N. Y.—CIVIL No. 121-251.

RITA GOTTESMAN, *et al.*,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION and E. I. DUPONT DE NEMOURS AND COMPANY,
Defendants.

Notice of Motion for Rehearing En Banc of Denial of Motion for Leave to Appeal from Interlocutory Order

Sirs:

PLEASE TAKE NOTICE, that upon the annexed affidavit of CLENDON H. LEE, sworn to February 14, 1964 and upon the notice of motion herein dated November 21, 1963 and the petition for leave to appeal interlocutory order annexed thereto, and upon the memoranda of respective counsel, the undersigned will move this Court at a time and place to be fixed by this Court at the United States Court House located at Foley Square, New York, N. Y. for rehearing *en banc* following decision to be rendered by the Supreme Court in a cause now pending, No. 402 Borak *v.* J. I. Case Co., of the denial by this Court by order dated January 31, 1964 of plaintiffs' motion for an order pursuant to 28 U. S. C. 1292(b) granting leave to the petitioners to appeal to this Court from the order of the District Court filed

November 12, 1963; and for such other and further relief as to the Court may seem just and proper.

Yours, etc.,

NETTER, NETTER, DOWD & FOX,
General Counsel for Petitioners,
RITA GOTTESMAN, *et al.*,
660 Madison Avenue,
New York, N. Y.,

by CLENDON H. LEE.

Dated: New York, N. Y.
February 14, 1964

(To Attorneys of Record.)

I hereby certify that the foregoing motion is presented in good faith and not for delay.

CLENDON H. LEE.

Petition for Rehearing En Banc

Affidavit of Clendon H. Lee.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

S. D. N. Y.—CIVIL No. 121-251

RUTA GOTTESMAN, *et al.*,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,
Defendants.

Affidavit in Support of Motion for Rehearing En Banc of Denial of Motion

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

CLENDON H. LEE, being duly sworn deposes and says:

1. I am a member of O'Connor & Farber, one of the attorneys of counsel for plaintiffs herein and submit this affidavit in support of the pre-fixed motion for rehearing *en banc* of the denial by order of this Court dated January 31, 1964 of plaintiffs' motion for leave to appeal from an interlocutory order.

2. Deponent respectfully submits that, in addition to the reasons set forth in plaintiffs' petition dated November 21, 1963 and in the reply memorandum on behalf of plaintiffs in support thereof, there exists compelling reason for the granting of the motion.

3. Plaintiffs' reply memorandum refers to and discusses the decision in Borak *v.* J. I. Case Co. (7 Cir. 1963) 317

F. 2d 838, Cert. granted November 12, 1963, Docket No. 402. In that case it was held upon interlocutory appeal that Section 14(a) of the Securities Exchange Act (15 U. S. C. 78n(a)) provides a remedy for money damage. Such Section is in relevant part as follows:

> "(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

For reasons fully set forth in such opinion and briefly referred to in plaintiffs' reply memorandum, the Court reached the conclusion that, despite the fact that there was no statutory mention of money damages, it was necessary that the statute be read to provide for money damages. As plaintiffs' reply memorandum points out, it is expressly provided, and not left to inference, that there shall be money damages for any violation of the anti-trust laws. Nevertheless, the order sought to be appealed from and the opinion of the District Judge rendered in connection therewith, hold that there can be no money damages for violation of the Clayton Act.

4. We do not reargue the merits in this affidavit. This motion for rehearing *en banc* is submitted in the interest of orderly procedure so that the conflict between the District Court below and the Court of Appeals in the *Borak* case, *supra* may be resolved following the decision by the Supreme Court of the United States therein. In view of the sweeping nature of the decision sought to be reviewed

in the entire field of Federal statutory construction, as well as with regard to the Clayton Act, it respectfully submitted that the question merits consideration *en banc*.

CLENDON H. LEE

Sworn to before me this 14th day of February, 1964.

EDNA M. MILBERY
Notary Public

EDNA M. MILBERY
Notary Public, State of New York
No. 24-7932800
Qualified in Kings County
Cert. filed with New York County
Term Expires March 30, 1964

Denial of Petitior. for Rehearing *In Banc.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

RITA GOTTESMAN, *et al.*,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. DUPONT DE NEMOURS AND COMPANY,

Defendants.

Before SWAN, SMITH, AND MARSHALL, Circuit Judges.

Petition for Rehearing In Banc.

NETTER, NETTER, DOWD & FOX, New York, N. Y.
for petitioners.

Judges Lumbard, Waterman, Moore, Friendly, Kaufman and Hays having elected to disqualify themselves from consideration of this matter, and the remaining qualified judges, Judges Swan, Smith and Marshall, having voted to deny the petition for rehearing *in banc*, the petition is denied.

T. W. S.
J. J. S.
T. M.
C. JJ.

3 2 64

Date:

Order Denying Petition for Rehearing *In Banc*.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of March, one thousand nine hundred and sixty-four.

Present:

HON. THOMAS W. SWAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

RITA GOTTESMAN, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

A petition for a rehearing *in banc* having been filed herein by counsel for the petitioners,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

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Office-Supreme Court, U.S.
FILED
JUN 26 1964
JOHN F. DAVIS, CLERK

No. 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

REBA GOLDSTEIN, MARY MAYFIELD and PAUL J. PRYSE, *Petitioners*,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 120

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER, *Petitioners*,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether this Court should review an order of a Court of Appeals by which that Court, in the exercise of the discretion confided to it by 28 U.S.C. § 1292(b), declined to permit the taking of an interlocutory appeal from a pretrial order of the District Court.

STATEMENT

The pretrial order of which petitioners complain was entered in a stockholders' derivative action instituted by petitioners as stockholders of General Motors Corporation against respondents shortly after this Court held in *United States* v. *E. I. du Pont de Nemours & Co. et al.*, 353 U.S. 586, that du Pont's ownership of stock in General Motors violated Section 7 of the Clayton Act. By consent of all parties, a number of such actions were consolidated in July 1958 into a single action, *Rita Gottesman, et al.* v. *General Motors and E. I. du Pont,* which was subsequently assigned to a single judge, The Honorable Charles M. Metzner, for all purposes.

The amended consolidated complaint contains fourteen counts.[1] The first eight are asserted under the antitrust laws. Each contains a separate recitation of facts claimed to justify relief. Joined with the factual allegations of each count is a separate paragraph invoking both the Sherman and Clayton Acts as alternative statutory bases for the liability claimed to have resulted by reason of the facts alleged. Thus, with respect to the first count, paragraph 14 of the complaint states:

> "At all times since said date [June 30, 1949, the date of the Government suit], and for some time prior thereto, the foregoing resulted in restraint of trade or commerce, in violation of Section 1 of the Sherman Act, and defendant du Pont attained or attempted to attain a monopoly position of a part of trade or commerce as a supplier of automotive fabrics and finishes, in violation of Section 2 of the

[1] For the Court's convenience, nine copies of the amended consolidated complaint have been lodged with the Clerk.

> Sherman Act, and it was reasonably probable that the effect of du Pont's acquisition and its continued holding and use of said General Motors stock was to restrain commerce in the United States as a whole and each quadrant, section and state thereof, and tended to give du Pont a monopoly position in said line of commerce, in violation of Section 7 of the Clayton Act."

Comparable allegations claiming a right to relief under both the Sherman and Clayton Acts on account of a single set of operative facts are made in each of the other seven antitrust counts. In the remaining counts of the complaint, each and every operative fact claimed to justify relief under the antitrust laws is repeated and claimed also to justify relief at common law. Thus, petitioners are seeking relief under a number of different legal theories, on account of a single course of alleged conduct.

Extensive pretrial proceedings have taken place in the District Court,[2] and that Court has made numerous pretrial rulings. For example, the Court has ruled that Federal Rule of Civil Procedure 23(b)(1) applies to causes of action based upon federal law, see 28 F.R.D. 325; has accepted petitioners' position that the running of the statute of limitations was tolled until March 1, 1963; and has rejected respondents' position that petitioners are precluded from taking a position in this litigation inconsistent with that taken by General

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[2] Thus by stipulation of the parties virtually the entire record of the proceedings before the trial court in the prior Government litigation has been introduced into evidence in this action. Respondents have tendered for examination some thirty witnesses who testified in that prior litigation, and petitioners have examined most of those witnesses.

Motors in the Government action, see 1963 Trade Cas. ¶ 70,910.

The Court of Appeals for the Second Circuit is fully familiar with this litigation. In addition to the denial of interlocutory review here attacked, in 1959 the Second Circuit denied a petition by respondents for interlocutory review of an order denying a motion to dismiss the complaint. In May 1964, that Court denied a petition for mandamus directed at an order Judge Metzner entered on July 15, 1963, which stayed prosecution of a suit brought by another General Motors stockholder, Schiff, who is represented by the counsel for petitioners in this Court, and whose case is identical in all respects with petitioners' except for the period of time for which recovery is sought. And, on June 18, 1964, the Court of Appeals dismissed as presenting no question not already decided on the *Schiff* petition for mandamus two appeals from an order Judge Metzner entered on April 15, 1964, refusing to consolidate the *Schiff* case with that brought by the petitioners.

The pretrial order which the Court of Appeals declined to review at this stage of the proceedings in the District Court was entered in the following circumstances: In numerous pretrial documents and conferences, petitioners have asserted that the judgment of this Court finding du Pont in violation of Section 7 of the Clayton Act established the existence of an unlawful restraint upon General Motors. The District Court, after receiving briefs and hearing argument, on November 12, 1963, entered an order ruling as to the significance of that judgment in the trial of this action. Although petitioners presumably sought review of the entire order, two provisions of that order were specifically challenged: (1) the ruling that insofar as

it alleges a violation of Section 7, the complaint fails to state a claim upon which relief can be granted, and (2) the ruling under Section 5 of the Clayton Act that the judgment in the Government suit may be used by petitioners in the trial of this case only for historical purposes and as background material because the two actions cover different time periods.[3]

REASONS FOR DENYING THE WRIT

The Court of Appeals did not deem it appropriate to exercise its discretionary authority to review, prior to trial in the District Court, the interlocutory order of the District Court described above. The ruling of the Court of Appeals is not a final or even an interlocutory determination of any substantive question presented in this case. Accordingly, the petition for certiorari, which is directed almost exclusively to the merits of the District Court's pretrial order, is largely beside the point.

Prior to the enactment of Section 1292(b) of the Judicial Code, appeal from the district courts to the courts of appeals could in general be had only from final judgments. In Section 1292(b) Congress made a limited modification of the final judgment rule by giving the courts of appeals the authority to undertake review of interlocutory district court orders on an appropriate certification by the district court.

Although Congress thus authorized the courts of appeals to accept interlocutory appeals, it carefully re-

[3] Petitioners apparently also now attack as too narrow paragraph 1(f) of the District Court's order relating to du Pont's supposed use of "its stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive finishes and fabrics." Petitioners did not challenge this provision of the order when asking the Court below for leave to appeal.

frained from compelling them to do so. Rather, as the very words of the statute state, it committed to the discretion of the courts of appeals the determination as to whether to undertake interlocutory review in any instance where the necessary certification had been made by the district court. As the Senate Report shows, the discretion thus lodged by Congress in the courts of appeals was intended to be fully as broad as that of this Court in exercising its discretionary appellate jurisdiction:

> "the court of appeals * * * may refuse to entertain such an [interlocutory] appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari." S. Rep. No. 2434, 85th Cong., 2d Sess. 3 (1958).

In the instant case the Court of Appeals has, after consideration of lengthy briefs of the parties directed largely to the question whether review at this time would materially advance the ultimate termination of the litigation, exercised its discretion to deny interlocutory review. This discretionary ruling, necessarily made in a highly particularized factual context, does not and could not present any issue of general importance or constitute, as petitioners suggest, an appropriate point of departure for this Court in giving guidance to the inferior federal courts in the application of Section 1292(b).

It may be noted that petitioners' extreme assertions as to the consequences of the District Court's pretrial order are in any event without merit. Insofar as that order relates to Section 7 of the Clayton Act, it goes to the legal theory advanced by petitioners and not to their factual claims. As noted above, each count of the complaint pleads a single set of facts, and demands

relief on a number of alternative legal theories. No single fact is alleged to be relevant only to the charges made under the Clayton Act and not to those under the Sherman Act or the common law. Thus, this aspect of the District Court's pretrial ruling has done no more than reject one of the alternative legal theories advanced by petitioners in support of a single "aggregate of operative facts," *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943). It in no way curtails the nature or the scope of the evidence that petitioners may produce in support of the factual allegations of their complaint.

As for that aspect of the order dealing with the significance under Section 5 of the Clayton Act of the judgment in the prior Government case, virtually the entire record in that case, including all the exhibits listed in the schedule printed in petitioners' appendix, is already in evidence in this case. Petitioners will therefore be free to urge the trial court to find on the basis of that record any facts that they claim that the Government record demonstrates.

Moreover, petitioners err in asserting that if review of the District Court's order awaits the entry of final judgment, "the entire matter will have to be sent back for a new trial" in the event that order is overturned. (Petition for Certiorari, p. 12.)

It is, in fact, likely that appellate review of the District Court's order will never be necessary. In the first place, petitioners can in no event recover in this case, on any legal theory, unless they first succeed in establishing actual injury to General Motors by reason of du Pont's ownership of General Motors stock. Petitioners' position with respect to this evidentiary burden was not and could not have been affected by the

District Court's order. Should plaintiffs fail at trial to discharge this burden, the question of the correctness of the District Court's pretrial ruling will necessarily be moot.

Alternatively, in the unlikely event that the District Court were to determine after trial that the evidence had demonstrated a violation of the Sherman Act—contrary to the finding of the District Court in the Government suit—and this ruling were to be affirmed on appeal, there would be no occasion to reach the question of the correctness of the District Court's pretrial order.

The question of the correctness of the District Court's order would be reached after final judgment only on the multiple assumptions that (1) the trial court will decide the case after trial in favor of respondents; and (2) that on appeal it will be determined that petitioners had made a showing of injury to General Motors but (a) that petitioners had not established a violation of the Sherman Act, or (b) that the trial court's conclusions based on the evidentiary record in the Government case were inconsistent with those of this Court in that case. But even if these eventualities occur so that the question of the propriety of the District Court's order is then reached, and it is thereupon determined that that order was in whole or in part erroneous, the consequences of that determination would not be a new trial. Rather, since this case will be tried to the District Court rather than to a jury, reversal on such grounds would require at most reassessment by the trial court, within a somewhat altered legal framework, of a record already made.

CONCLUSION

For the foregoing reasons the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 120.

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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Respondents' brief in opposition seeks to make a virtue of a necessity. Respondents have declined to discuss the antitrust laws and the judicial code. Instead, respondents have cited a single diversity case construing tort law of New York and the impact of a specific federal rule.

Statutes are not repealed nor decisions expunged by failure to discuss them.

Indeed, where a square conflict among the Circuits has arisen, too late for inclusion in our petition mailed May 26, 1964 but in ample time for inclusion and discussion by respondents, petitioners are obligated to bring such recent cases to the attention of this Court, even though respondents choose to ignore them.

The Third Circuit has now squarely held that Section 7 of the Clayton Act affords a private party relief of money damages for violation thereof. *New Jersey Wood Finishing Company* v. *Minnesota Mining and Mfg. Co.*, F. 2d (published May 25, 1964 in CCH Trade Regulation Reports, Para. 71,110). That case expressly conflicts with the instant case. That case expressly conflicts also with *Highland Supply Corp.* v. *Reynolds Metals Co.*, 8 Cir. 1964, 327 F. 2d 725. The lower court decisions in both such cases are cited at page 14 of our petition, but the appellate decisions are not discussed or cited by respondents.

Respondents also fail to discuss *J. I. Case, et al.* v. *Borak*, U. S. , determined by this Court on June 8, 1964 and cited on certiorari in our petition at pages 15 and 20.

Instead of treating with the points at issue, and the two questions presented in the petition, respondents state that there is only one question presented in the petition* and limit their arguments in essence to a claim that the case at bar is "highly particularized" (Resp. br., p. 6) and that the Court of Appeals is "fully familiar with this litigation" (Resp. br., p. 4). From these two totally unsupported propositions, respondents request this Court mechanically to deduce that review is unwarranted.

But this case is no more "highly particularized" than the Clayton Act itself. Six out of the eight active judges of the Second Circuit disqualified themselves (Pet., p. 2), obviously precluding that Court's being "fully familiar with this litigation".

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* The footnote on page 5 of respondents' brief is misleading. The District Judge's certificate (A-28) related to his entire order, and the petition for leave to appeal (A-2) sought leave to appeal the entire order. The "Questions Presented" (Pet. 3-4) are clearly the same as those presented to the Court of Appeals.

Treating first with the *J. I. Case* decision, this Court affirmed the reversal of a lower court which had held "that its jurisdiction was limited to declaratory relief in a private, as opposed to a government, suit alleging violation of 14(a) of the Act." [15 U. S. C. 78n(a)] The case at bar likewise holds that a private party is limited to declaratory and prospective relief under Clayton 7. Since this Court used the antitrust laws to illustrate the policy to be served by the Securities Exchange Act of 1934, it is patent that the decision below is repugnant to the *Case* decision. This Court stated:

> "To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements."
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> . . . . . .
>
> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942):
>
> > 'When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.' See also *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (1944); *Deitrick* v. *Greaney*, 309 U. S. 190, 201 (1940).

It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). Section 27 grants the District Courts jurisdiction 'of all suits in equity or actions at law brought to enforce any liability or duty created by this title. . . .' In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor. *Deckert* v. *Independent Shares Corp.*, 311 U. S. 282 (1940). This significant language was used:

> 'The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.' At 288. See also *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U. S. 288 (1960); *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948)."

Since the Court below has held that a private action under Clayton 7 is declaratory and prospective only, the respondents' brief is not accurate when it indicates (page 7) that the ruling below does not curtail the nature or the scope of the evidence that petitioners may produce. Evidence to show a violation of the Clayton Act, already found by this Court as an ultimate fact, is irrelevant and immaterial to prove any point at issue in a private suit for

money damages under that section, if relief thereunder is purely declaratory and prospective. Respondents are flatly in error when they state, also on page 7 of their brief, that "virtually the entire record" in the government suit "is already in evidence in this case." The stipulation to which respondents refer provides that such evidence may be introduced "subject to the right of any other party to object on the ground of materiality or relevancy."

Obviously, the record in the government suit proving violation of Section 7 will be irrelevant and immaterial to prove money damages under that section, since the court has held that money damages may not be recovered thereunder. Furthermore, the trial judge may rule such evidence immaterial, because he has found that the final judgment in the government suit can be introduced only for "historical purposes and background material." In addition, such evidence may be ruled out because declaratory and prospective relief has already been granted in the final judgment in the government suit made March 1, 1962.

Respondents part company with the District Judge. Respondents argue (pp. 6-8 of Resp. br.) that no new trial will be necessary if the decision below is ultimately reversed on appeal. Not only will a new trial be necessary, but also an entirely new deposition-discovery will be necessary, unless after the first trial petitioners are forced into a new trial without the benefit of pre-trial discovery under a correct interpretation of the Clayton Act. For the District Judge clearly stated the purpose of his ruling (App. 17):

> "However, a different approach is necessary in this case in order to define the scope of 'deposition-discovery procedures.'"

Thus, the District Judge to whom this case is assigned for all purposes has fairly apprised the parties as to the nature

and quantum of proof which he will receive, and that he will undoubtedly prevent discovery of and render inadmissible evidence showing a violation of the Clayton Act and damage resulting therefrom, since he has held "[t]here can be no claim for money damage for violation of Section 7."

Manifestly, this is precisely the type of situation that §1292(b) was intended to remedy.

Respondents' reliance on the single case *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 F. 2d 187 (2 Cir. 1943) is misplaced. In that diversity suit the Court of Appeals properly held that where it was alleged defendants (1) induced the breaking of contracts and (2) maliciously made false statements, such allegations might be combined in a single count for tortiously interfering with the plaintiff's business under New York law. This is far different from the specific grant of federal jurisdiction to adjudicate federal rights under both the Clayton Act and the Sherman Act.

The short answer to respondents' argument is that Congress has provided in the Clayton Act a private right to sue for injury, with its own separate and distinct burden of proof which, as our petition points out (Pet. pp. 11, 18), and as is emphasized by the dissenting opinion of Mr. Justice Harlan in *United States* v. *First National Bank and Trust Company of Lexington*, U. S. (April 6, 1964), is a different cause of action and has a different burden of proof from the Sherman Act.

Moreover, Section 7 of the Clayton Act has undoubtedly become the principal weapon in the antitrust arsenal. From January 1, 1955 until January 1, 1963 the Department of Justice filed 68 cases under Clayton 7, and of those

cases only 16 also alleged violations of other antitrust laws. A. B. A. *Section of Antitrust Law, Merger Case Digest* (1963). It is clear, therefore, that Section 7 of the Clayton Act, having its own distinct burden of proof both for the government and for private parties, is now the principal statutory device to prevent restraint of trade and monopoly via concentration of assets and stock ownership.

It would be a statutory anomaly indeed which provides for the atrophy of private actions under the very law which was enacted to encourage them, and which blocks proof of damage in private actions while providing treble damages. While the public right of action may be sustained by "probability", damage inflicted by du Pont, caused by violation of Section 7 and while in violation thereof, creates the private right of action. Probability must be construed to precede actual damage, not to preclude it.

What the respondents are asking this Court to do by urging that only a "legal theory" has been affected by the decision below, is to disregard this Court's decision in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699, and approve the lower court's "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each". The government litigation under Section 7 of the Clayton Act is certain to result in a large number of private antitrust suits under that Section, all of which will be fragmented and compartmentalized for years to come, unless this Court now reviews the decision below that "There can be no claim for money damages for violation of Section 7."*

* This litigation is further fragmented and compartmentalized in time—almost into separate "antitrust years", as it were—by the indefinite stay of the *Schiff* action (referred to on pp. 8-9 of Petition and at p. 4 of Resp. br.). There, the Court of Appeals has

While no list of presently pending cases can be exhaustive, the conflict already existing between the *Highland Supply Corporation* case, *supra*, where that court has "compartmentalized" and fragmented private remedies as in the case at bar, with the decision in *New Jersey Wood Finishing Co., supra*, should now be resolved by this Court. Petitioners submit that the following excerpts from the Third Circuit's decision correctly and conclusively show the necessity of reviewing the case at bar and correcting the court below (CCH, Para. 71, 110, May 25, 1964):

> "N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that 'persons' injured by violations 'of the antitrust laws' shall be entitled to threefold damages. 15 U. S. C. 15 (1958) 'Antitrust laws' as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3]
>
> . . . . . .
>
> "While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and

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denied a petition for a writ of mandamus to vacate such stay and has also dismissed an appeal of motions to consolidate the *Schiff* action and this consolidated *Gottesman* action. The *Schiff* action claims damages from at least 1936 to date. In this consolidated *Gottesman* action damages are barred prior to 1950.

A petition for certiorari will be filed to review the denial of mandamus and to review the denial of consolidation.

> "[3] These 'antitrust laws' are: The Sherman Act (Act of July 2, 1890, c.647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c.323, 38 Stat. 730); and the Wilson Tariff Act (Act of August 27, 1894, c.349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c.40, 37 Stat. 667)."

s of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are 'interlaced' remedially as well as substantively evincing a Congressional desire for a 'cumulative remedy' for the threats and dangers to trade and competition. See *Federal Trade Commission* v. *Cement Institute* [1948-1949 Trade Cases ¶62,237] 333 U. S. 683, 694-695 (1948); *United States* v. *Borden Company* [1954 Trade Cases ¶67,754] 347 U. S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the 'cumulative remedy' Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7."

* * * * * *

"The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963)), to hold that such a proceeding was not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether

> that action is brought by the Justice Department or the FTC; that it is not a question whether it is a judicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the 'antitrust laws'."

Thus, the Third Circuit has held that a private right of action exists under Section 7 for money damages. The Court below has held to the contrary, blocking proof of any damage caused by du Pont's violation of Section 7. The vast amount of private litigation arising out of violations of Section 7 cannot be determined until this Court settles the question, as it ultimately must. Both *Case* v. *Borak*, *supra*, and the lower court decision in *N. J. Wood Finishing* case *supra*, were brought to the attention of the Court of Appeals below. As the appendix shows (pp. 34-35) the Court of Appeals was requested upon petition for rehearing *en banc* to await this Court's decision in the *Borak* case. In the foregoing circumstances, and in view of the fact that only two of the active judges of the Court of Appeals have failed to disqualify themselves in this proceeding, it is respectfully submitted that this Court should now take jurisdiction and furnish guidance in the interpretation of Section 1292(b) of the Judicial Code and Section 7 of the Clayton Act.

Finally, the challenge to this Court's jurisdiction implicit in the argument at p. 6 of respondents' brief cannot be countenanced, for it assumes this Court has no power to review abuse of discretion under the Judicial Code or the Federal Rules.

It is respectfully submitted that the petition should be granted.

Dated: July 10, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 120.

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners Gottesman *et al.* pray that this Court grant rehearing of its order of October 19, 1964 denying the petition for a writ of certiorari, and that this Court postpone determination of this petition for rehearing until consideration on the merits of *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.* (No. 291, October Term 1964) and thereafter that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in this case as prayed for in the petition filed May 27, 1964 herein.

Reasons for Granting Rehearing, Postponing Consideration, and Issuing the Writ.

This petition is made pursuant to Rule 58 (2) of the Rules of this Court and is confined to the grounds thereof.

The granting of certiorari in the *Minnesota Mining and Manufacturing Co.* (hereafter called "3M") case, No. 291, constitutes an intervening circumstance which is both substantial and controlling. The fact that this Court in granting certiorari in that case stated:

> "The Solicitor General is invited to file a brief expressing the views of the United States."

reflects the importance which this Court has already attached to the underlying issue in that case, which is even more sharply presented in this Gottesman suit.

New Jersey Wood Finishing Co. alleges in the "Second Count" of its amended complaint in the 3M case as follows (55a, Third Circuit Appendix):

> "3. The effect of the aforesaid acquisition, set forth more particularly in Paragraphs 5, 6, 7 and 8 of the First Count was substantially to lessen competition and to tend to create a monopoly in violation of Section 7 of the Clayton Act.
>
> "4. As a result of the aforesaid violation of the Clayton Act plaintiff suffered damage and injury."

In the case at bar, the decision of the District Judge herein holds (A-27 of Petition, No. 120, October Term, 1964):

> "(4) Plaintiffs' claims under Section 7 of the Clayton Act do not constitute a basis for either injunctive relief or recovery of money damages in this action, and such claims are hereby dismissed as a matter of law."

He had previously stated in his memorandum opinion (A-24):

> "There can be no claim for money damages for a violation of Section 7 [of the Clayton Act]."

3M's motion to dismiss, now before this Court in No. 291, reads (11a, Third Circuit Appendix):

> "Defendant, Minnesota Mining and Manufacturing Company hereby moves as follows:
>
> "1. That the complaint herein be dismissed pursuant to Rule 12(b) for failure to state a claim upon which relief can be granted or that summary judgment in favor of this defendant against the plaintiff be entered pursuant to Rule 56(b) * * *."

3M's petition for certiorari states (p. 14):

> "Plaintiff rests solely upon only one aspect of the charge made by the FTC in Docket 7973—that 3M's ultimate acquisition of IWI, following seven prior acquisitions in the electrical insulation field, might tend to lessen competition in violation of Section 7 [of the Clayton Act]."

Thus, underlying that entire case, in which this Court has requested the views of the Solicitor General in addition to the arguments to be presented on the merits by the parties, is the question of the sufficiency of a complaint for money damages under Section 7. This Court's desire to be fully informed may reflect a realization that from January 1, 1955 until January 1, 1963 the Department of Justice filed 68 cases under Clayton 7, and of those cases only 16 also alleged violations of other antitrust laws. A. B. A. Section of Antitrust Laws, *Merger Case Digest*, (1963).

Since Section 7 has increasingly become the principal means for government enforcement of the antitrust laws,

it is to be expected that private actions to promote enforcement in the public interest and to secure remedies for damages to private interests should likewise increase. The opinion of the Court of Appeals for the Third Circuit expressly sustained the complaint of New Jersey Wood Finishing Co. for money damages under Section 7, as well as under the Sherman Act, stating (332 F. 2d at 360):

> "Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5 (b) tolls the statute as to 'any matter complained of' in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M. While 'contract or conspiracy' was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to 'restrain competition and to monopolize trade.' There was a 'substantial identity of subject matter.' Union Carbide and Carbon Corporation *v.* Nisley, 300 F. 2d 561, 570 (10 Cir. 1962). We, therefore, hold that the acquisition of IWI was a 'matter complained of' within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts.' Union Carbide, supra; Steiner *v.* 20th Century-Fox Film Corporation, 232 F. 2d 190, 196 (9 Cir. 1956)."

Indeed, even in the Southern District of New York where this *Gottesman* case is pending, District Judges have continued to assume the validity of a claim for money damages for violation of Section 7. In *Ames Co. et al* v. *Bostich, Inc.* (S. D. N. Y. No. 62 Civ. 1) the District Judge, in granting a protective order in connection with interrogatories stated (September 23, 1964):

> "This is an action brought under Clayton Act, Section 7 (15 U. S. C. § 18) which seeks treble damages in the amount of $3,600,000 and injunctive relief based on an alleged violation of the United States antitrust laws by the defendant arising out of the defendant's acquisition in 1961 of the assets of Calwire, Inc., and Calnail, Inc., two affiliated California corporations engaged, respectively, in the manufacture and sale of heavy duty pneumatic nailing and stapling equipment." (Not officially reported, CCH Trade Cases ¶71,248)

Likewise in the Southern District of New York, Judge McLean's decision in *General Plywood Corp. v. U. S. Plywood Corp.* discloses a complaint for damages based squarely upon violation of Section 7 of the Clayton Act. (Not officially reported, CCH Trade Cases ¶71,117.)

The Court in *Utah Gas Pipeline Corp. v. El Paso Natural Gas Co., et al.* (D. C. Utah, Central Division, No. C 106-63, September 24, 1964 (Not officially reported, CCH Trade Cases ¶71,252) has taken specific note of the decision below in this *Hottesman* case and has declined to rule as to the sufficiency of that particular complaint "until the allegations of the complaint with reference to Section 7 are further brought into focus." That District Court further noted the conflict between this *Hottesman* case and the *Hall* case (No. 291), as well as language in *Highland Supply Co. v. Reynolds Metals Co.* (8 Cir. 1964), 327 F. 2d 725, which might be construed to deny a right of action for money damages.

A further intervening circumstance of substantial and persuasive importance is the decision of the Court of Appeals for the First Circuit in *Haverhill Gazette Co. v. Union Leader Corporation*, 333 F. 2d 798 and 333 F. 2d 808*. That case drew the distinction, which we sought to

* Certiorari pending, No. 502.

make in our petition and in our reply brief, between mere injunctive relief and a claim for actual damage, for the Court there said (333 F. 2d at 802):

> "In a private antitrust action liability and damages are not separate. Granting that an injunction may require a finding of merely threatened loss, 15 U. S. C. §26, a partial decree on all issues of liability, however considered, implies much more. One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage."

The First Circuit relied upon the classic expression by Mr. Chief Justice Stone in *Bigelow, et al* v. *R.K.O. Radio Pictures, Inc. et al*, 327 U. S. 251, which so clearly distinguished between the burden of proof to show liability and the burden of proof required to show damage. It could likewise have relied upon what this Court said last term in *Simpson* v. *Union Oil of California*, 377 U. S. 13:

> "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed."
>
> * * * * * *
>
> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant."

Mr. Chief Justice Stone in the *Bigelow* case stated for the Court (327 U. S. at 265):

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. *v.* Sealright Co., 2 Cir., 141 F. 2d 972, 979. That principle is an ancient one. Armory *v.* Delamirie, 1 Strange 505, and

> is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see The Pennsylvania, 19 Wall. 125, 136 * * *."

Since the decision herein prevents the proof of either "impact" or "damage" under Clayton 7, it is manifestly repugnant to the First Circuit's intervening decision in the *Haverhill Gazette Co.* case, *supra,* which is squarely and firmly grounded upon this Court's decision in *Bigelow, supra.* In the light of the intervening *Haverhill Gazette* case the Court might well desire to consider again what we stated in our reply brief (p. 7):

> "It would be a statutory anomaly indeed which provides for the atrophy of private actions under the very law which was enacted to encourage them, and which blocks proof of damage in private actions while providing treble damages. While the public right of action may be sustained by 'probability', damage inflicted by du Pont, caused by violation of Section 7 and while in violation thereof, creates the private right of action. Probability must be construed to precede actual damage, not to preclude it."

The granting by this Court of the petition for certiorari in the 3M case (No. 291) means that as a first step to deciding that case, this Court must determine the sufficiency of a complaint alleging money damages under Section 7 of the Clayton Act. Petitioners Gottesman et al. seek relief which establishes the initial and underlying premise of that case; namely, that a private party claiming to be injured by violation of Section 7 of the Clayton Act may obtain money damages therefor, and is not restricted merely to

declaratory or prospective relief. (See *J. I. Case, et al.* v. *Borak*, 377 U. S. 426). The determination of this point of law, in the light of the criteria set forth in the *Bigelow* case, should most appropriately be determined where this Court has already adjudicated that violation of the Clayton Act "led" (past tense) to "insulation" of the market, and where this Court ordered divestiture as the "competition restoring" remedy which would be "effective to redress the antitrust violation proved". (Gottesman petition, No. 120, p. 21).

This Court had Minnesota Mining and Manufacturing Co.'s petition before it following an interlocutory appeal under 28 U. S. C. 1292(b), just as this Court determined *J. I. Case* v. *Borak*, *supra*, and as the First Circuit determined the *Haverhill Gazette* case, *supra*, after interlocutory appeal. In this Gottesman case the District Judge likewise made the requisite certificate, but leave to appeal was denied, and six of the eight active Judges disqualified themselves upon petition for rehearing *en banc*. We submit that the intervening circumstances referred to above emphasize more strongly than we could do in our petition the importance of this Court's determination of appropriate criteria for review under Section 1292(b).

Conclusion.

For the foregoing reasons and those set forth in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that this Court postpone determination of this petition for rehearing until consideration on the merits of *Minnesota Mining and Manufacturing Co.* v. *New Jersey Wood Finishing Co.* (No. 291, October Term 1964) and thereafter that a writ of certiorari issue

to review the decision of the United States Court of Appeals for the Second Circuit in this case as prayed for in the petition filed May 27, 1964 herein.

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November 12, 1964

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

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